Supreme Court

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No._____

IN THE
SUPREME COURT OF THE UNITED STATES

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PHILLIP RATH,
Petitioner,

vs.

STATE OF MISSOURI,
Respondent.

* * * * *

ON PETITION FOR WRIT OF CERTIORARI TO
THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

* * * * *

PETITION FOR WRIT OF CERTIORARI

* * * * *

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34 pp

QUESTION PRESENTED

Whether the prosecutor's argument that Mr. Rath "had eleven months to think about this" before testifying at his trial violated Mr. Rath's right against self-incrimination as construed by this Court in *Doyle v. Ohio?*

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Phillip Rath, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Missouri Court of Appeals, Southern District rendered in these proceedings on April 30, 2001.

OPINION BELOW

The opinion of the Missouri Court of Appeals, Southern District, is published at 46 S.W.3d 604, and is reprinted in the appendix to this petition at page 1a, *infra*. The unpublished order of the Missouri Court of Appeals denying rehearing and transfer is reprinted in the appendix to this petition at page 14a, *infra*. The unpublished order of the Supreme Court of Missouri denying transfer is reprinted in the appendix to this petition at page 15a, *infra*.

JURISDICTION

The original opinion of the Missouri Court of Appeals was entered April 30, 2001. A timely motion to that court for rehearing or, in the alternative, for transfer to the Missouri Supreme Court, was denied May 22, 2001. A timely application to the Missouri Supreme Court for transfer was denied June 26, 2001.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. Amend. V (Self-incrimination Clause)

No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

U.S. CONST. Amend. XIV (Due Process Clause)

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

Summary. This petition concerns Mr. Rath's claim that the prosecutor's argument that Mr. Rath "had eleven months to think about this" before testifying at trial violated the rule of *Doyle v. Ohio*, 426 U.S. 610 (1976) prohibiting comments on the post-arrest silence of the defendant.

Facts and procedural history. After a jury trial, Mr. Rath was convicted two counts of first-degree assault and two counts of armed criminal action arising out of the assault counts. He was sentenced to twenty year terms of imprisonment for each assault, and consecutive ten year terms of imprisonment for each armed criminal action count.[1] He offered a defense of self-defense, asserting that one of the alleged victims had fired on him with a rifle, and that he had fired the weapon to protect himself.

The trial turned largely on the relative credibility of Mr. Rath and the two alleged victims, Christina Hembree and Alan Divine. According to Ms. Hembree and Mr. Divine, Mr. Rath, who had a prior relationship with Ms. Hembree, came uninvited to her house. Ms. Hembree and Mr. Divine came outside; Ms. Hembree was carrying a rifle. Ms. Hembree and Mr. Rath argued. Mr. Rath walked back towards his vehicle. Then, according to Ms. Hembree, Mr. Rath turned, aimed, and fired a gun, striking her in the leg. He then allegedly shot Alan Divine in the leg. After the shooting, according to Ms. Hembree, Mr. Rath entered her house and overturned furniture. Eventually he left, and Ms. Hembree got help from a neighbor. Mr. Divine testified that Mr. Rath shot through the front door after shooting him and Ms. Hembree.

Mr. Rath testified in his own behalf that he had gone to Ms. Hembree's home on her invitation to return some property of hers, including a pistol, and to pick up some property of his. When he arrived, he saw Ms. Hembree with a rifle, and Mr. Divine behind the porch. He immediately

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[1] A dispute, not relevant to this petition, has arisen over whether Mr. Rath's sentences are all consecutive, for a total of sixty years, or partially concurrent for a total of thirty years. Under Missouri law, Mr. Rath will be required to serve 85% of his sentences for assault before he is eligible for parole.

believed he had been "set up." He argued briefly with Ms. Hembree, who denied asking him to come to her house and told him to leave. Ms. Hembree pointed the rifle at Mr. Rath as they argued. Mr. Rath turned and walked back to his truck. As he did so, Ms. Hembree fired at him. He turned, pulled pistol from his waistband, and fired three shots over the heads of Ms. Hembree and Mr. Divine. Mr. Rath testified that he shot in self-defense to protect his retreat.

Three shell casings, which matched the gun used by Mr. Rath, were found near his vehicle. Bullet holes were found in the awning over Ms. Hembree's house. This evidence was consistent with Mr. Rath's account of the events and inconsistent with that of Mr. Divine, who testified that Mr. Rath approached and shot through the front door. The physical evidence was also inconsistent with Ms. Hembree's testimony that Mr. Rath aimed his gun directly at her. No other eyewitnesses testified, and no evidence was offered about any statements made by Mr. Rath after his arrest.

The prosecutor argued that the testimony of the alleged victims should be believed, and that of Mr. Rath should be disregarded. In her closing argument, she stated,

> And then we have the story of Phillip Rath. Phillip Rath claims his story matches the physical evidence. Of course it does. Do you know why? He's had the advantage of seeing the physical evidence, the photographs. He's heard Christine testify. He's heard Alan Divine testify. He's read all the police reports. And he's had eleven months to think about this before –[2]

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[2] See Appendix at p. 16a-17a for this portion of the argument.

A defense objection on the ground that the last statement was an improper comment on Mr. Rath's right to remain silent was overruled. Then, the prosecutor reiterated, "Gentlemen, it's been eleven months since this incident. His story conveniently matches the physical evidence."

Mr. Rath raised the issue of improper comment on the right to remain silent again in his motion for new trial, direct appeal to the Missouri Court of Appeals, Southern District, motion for rehearing in that court or transfer to the Missouri Supreme Court, and application for transfer in the Missouri Supreme Court.

Mr. Rath's conviction was affirmed on appeal, *State v. Rath*, 46 S.W.3d 604 (Mo. App. 2001), and all post-opinion motions were denied. This petition follows.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT REVIEW TO CORRECT A CLEAR VIOLATION OF *DOYLE V. OHIO*.

In *Doyle v. Ohio*, 426 U.S. 610, 618 (1976), this Court held that a criminal defendant who testifies in his own behalf may not be impeached with evidence that, after he was arrested and warned of his right to remain silent[3], he did not make a statement to authorities. Those warnings, this Court held, carry an implicit "assurance that silence will carry no penalty."

Mr. Rath was arrested soon after the incident. He was in custody for the "eleven months" referred to by the prosecutor. The prosecutor twice argued that he "had eleven

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[3] See *Miranda v. Arizona*, 384 U.S. 436 (1966); U.S. CONST. AMEND V, XIV.

months to think about this"[4] before testifying. Yet, the Missouri Court of Appeals held, "Nothing in the prosecutor's argument can be interpreted as telling the jury it should find Defendant less credible because Defendant never spoke up earlier." *State v. Rath*, 46 S.W.3d 604, 609 (Mo. App. 2000).

The reference in the prosecutor's argument was a clear violation of *Doyle*. It is the functional equivalent of the question condemned in *Doyle*: "Mr. Wood, if that is all you had to do with this and you are innocent, when Mr. Beamer arrived on the scene why didn't you tell him?" *Doyle v. Ohio*, 426 U.S. 610, 614 (1976). Just like the prosecutor in *Doyle*, the prosecutor here was asking the jury to infer that Mr. Rath's account "conveniently" matched the physical evidence[5] because he had not given a statement before seeing the evidence against him. The attack on his credibility was directly related to his post-arrest silence.

In *Doyle*, this Court declined to cheapen the right against self-incrimination by permitting the prosecution to argue that a defendant was less credible at trial because he had exercised his constitutional right to remain silent after his arrest. This Court quoted with approval the concurring opinion of Mr. Justice White in *United States* v. *Hale*, 422 U.S. 171, 182-183 (1975):

> When a person under arrest is informed, as *Miranda* requires, that he may remain silent, that anything he says may be used against him, and that he may have an attorney if he wishes, it seems to me that it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest

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[4] Appendix, pp. 16a-17a.

[5] Appendix, p. 17a

> and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony. . .
>
> *Doyle v. Ohio*, 426 U.S. 610, 619 (1976).

The prosecutor in this case was free to argue that Mr. Rath was not telling the truth because he wanted to avoid conviction. She was free to argue (and did) that Mr. Rath had the benefit of hearing the state's witnesses testify before he did. She was free to argue that Mr. Rath was not credible because of his prior convictions. But she was not free to argue that he must have fabricated his story because he had made no statement since the incident.

As this Court stated so eloquently in *United States v. Berger*, 295 U.S. 78, 88 (1935):

> [The prosecutor] is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

The prosecutor's twofold reference to the "eleven months" which Mr. Rath had to concoct a story which matched the physical evidence violated the prohibition of *Doyle v. Ohio* and Mr. Rath's right to due process of law

guaranteed by the United States Constitution. This Court should grant review to protect that right.

II. THIS COURT SHOULD GRANT REVIEW TO ESTABLISH THE CONTINUING VIABILITY OF *DOYLE V. OHIO* AND TO MAINTAIN UNIFORMITY IN CONSTITUTIONAL DECISIONS.

The holding of the Missouri Court of Appeals conflicts with a number of recent authorities. For example, in *United States v. Tyndall*, 2001 U.S. App. LEXIS 19237*7 (8th Cir. Aug. 29, 2001), the court found that the statement, "Today is the first time that anybody associated with law enforcement has heard this version of events from you, isn't it?" violated *Doyle*. The conviction was saved only because the trial court sustained a defense objection and promptly instructed the jury to disregard. In *State v. Hazley*, 19 P.3d 800 (Kans. App. 2001), the court reversed for prosecutorial misconduct based in part on the prosecutor's arguments concerning the post-arrest silence of a defense witness.

In *Commonwealth v. Clarke*, 48 Mass. App. Ct. 482, 487; 722 N.E.2d 987 (Mass. App. 2000), the court reversed where the prosecutor argued that the defendant had taken advantage of his right to remain silent to allow him time to fabricate a defense. And in *McFadden v. State*, 342 S.C. 637; 539 S.E.2d 391 (S.C. 2000), the South Carolina Supreme Court held that the defendant was denied effective assistance of trial counsel where the prosecutor argued that the defendant was guilty because he failed to present a defense and defense counsel did not object. See also *United States v. Rodriguez*, 2001 U.S. App. LEXIS 16956 (11th Cir. July 30, 2001) (Error for prosecution to argue "He didn't say this when he was arrested"); *State v. Holliday*, 333 S.C. 332; 509

S.E.2d 280 (S.C. App. 1998) (Error to permit questioning of defendant concerning the fact that this was the first time he had "told this story").

On the other hand, the need for this Court to revisit the *Doyle* issue is further demonstrated by the decision of the Connecticut Supreme Court in *State v. Turner*, 252 Conn. 714; 751 A.2d 372 (Conn. 2000). There, the court held that the fact that Turner had failed to make timely disclosure of his alibi witness permitted the prosecutor to ask him, on cross-examination, why he had not earlier told the police about his alibi, and to argue that it must have been fabricated because it had not been mentioned earlier.

The decisions in Mr. Rath's case and in *Turner* may have been influenced by this Court's decision in *Portuondo v. Agard*, 529 U.S. 61 (2000). *Portuondo* was decided a few days before *Turner*, and about a month before Mr. Rath's case. In *Portuondo*, this Court made a distinction between the comment on post-arrest silence condemned in *Doyle* and comment on the fact that the defendant had the opportunity to hear the state's witnesses testify before testifying himself. In Mr. Rath's case, the prosecutor commented on *both* the opportunity to hear the prosecution witnesses and the fact that for the past eleven months, Mr. Rath could examine the evidence and "come up with this story." The distinction is significant, because under *Doyle*, the *Miranda* warning creates the expectation that post-arrest silence will carry no penalty.

To clarify any confusion created by *Portuondo*, and to maintain uniformity in the law, this Court should grant review and reverse for this clear violation of *Doyle v. Ohio*.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Missouri Court of Appeals, Southern District.

Respectfully submitted,

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APPENDIX

APPENDIX

STATE OF MISSOURI,
Plaintiff-Respondent

v.

PHILLIP RATH,
Defendant-Appellant

No. 23706

Court Of Appeals Of Missouri, Southern District, Division One

April 20, 2001

A jury convicted Phillip Rath (Defendant) of two counts of first-degree assault, §565.050, and two counts of armed criminal action, §571.015.[1] The trial court sentenced Defendant to prison terms of twenty years on each assault count and ten years on each armed criminal action count. Defendant's appeal presents four questions:

First, did the court err in allowing a jury argument that Defendant characterizes as an impermissible comment on Defendant's post-arrest silence?

Second, did the court err when it allowed victim testimony about the seriousness of her injuries?

Third, did the court commit reversible error by allowing a closing argument that Defendant was a dangerous man and the victims "deserved peace."

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[1] All statutory references are to RSMo 1994, unless otherwise stated.

Fourth, did the court "plainly err" by reciting in the sentence and judgment that Defendant was convicted of class A first-degree assaults rather than class B convictions?

We answer the first three questions in the negative, and we agree there was plain error as posed by the fourth question. Therefore, Defendant's first three points are denied, and because the fourth has merit, we remand for correction of the judgment as directed.

FACTS

After Defendant met Christine Hembree ("Hembree") at their mutual place of employment in November 1998, a romantic relationship developed between them. Hembree ended the relationship in late winter or early spring of 1998 after learning Defendant had a criminal record. Defendant was not amenable to Hembree's decision and repeatedly called Hembree, followed her, and showed up at her home. In April 1999, Defendant went to Hembree's rural farm home in Dade County and entered through an unlocked door. When Hembree refused Defendant's request to move into her house, Defendant shoved her and inflicted bruises. This incident led Hembree to call law officers and ultimately to obtain a full order of protection through the circuit court. Although the order against Defendant contained broad prohibitions, he continued to call Hembree.

Because of her fear of Defendant, Hembree borrowed a dog from a friend, Alan Divine ("Divine"). Her purpose was to have the dog outside her home to warn her if Defendant approached. Divine and Hembree moved the dog and an item of furniture to Hembree's house in the early morning hours of May 24, 1999. Shortly after arriving at the house, Hembree and Divine saw Defendant slowly driving past. At 3:04 a.m., they again saw Defendant driving by on the highway, only this time he turned around and pulled into the driveway. Defendant parked his truck at an angle as to block Hembree's

car. He then got out of his truck and walked to the back porch. By this time Hembree had armed herself with a .22 caliber rifle. Defendant, who was "very angry," kept telling Hembree they needed to talk, while Hembree insisted Defendant must leave. After 10 to 15 minutes of confrontational shouting, Defendant started to walk away. However, when Defendant reached Hembree's car, he turned and produced a 9-millimeter pistol from beneath his jacket. He then shot Hembree in the leg and Divine in the right thigh. Thereon, Hembree retreated into the house, and Divine fled around the house with Defendant in pursuit, firing his pistol. Hembree could not telephone for help because Defendant had disconnected the telephone lines from the house. Ultimately, Hembree and Divine escaped from the premises, albeit separately. Hembree went to one neighbor's house and Divine to another where they summoned help from law enforcement officials. Defendant fled the crime scene, and ultimately was arrested in Joplin, Missouri. When arrested, he had the pistol used in the offenses. At trial, Defendant testified Hembree shot at him with her rifle while his back was turned, and that he shot Hembree in self-defense. He suggested that Hembree must have shot Divine with a gun other than her .22 caliber rifle.

The jury convicted Defendant of the crimes mentioned in the opening paragraph and after sentencing, he filed this appeal.

STANDARD OF REVIEW

Concerning alleged trial court errors that have been preserved, we review for prejudice, not mere error, and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial. *State v. Hutchison,* 957 S.W.2d 757, 761[1] (Mo. banc 1997). Issues that were not preserved but are claimed as error on appeal may be considered only if the court finds that manifest injustice or miscarriage of justice has resulted from the alleged error. *Id.* at 761[2].

DISCUSSION AND DECISION

POINT I: IMPROPER COMMENT ABOUT PRIVILEGE AGAINST SELF-INCRIMINATION

Defendant's first point complains about a prosecutor's remark made in the first part of his closing argument to the jury. Specifically, he objected when the prosecutor told the jury:

> And then we have the story of Phillip Rath. Phillip Rath claims his story matches the physical evidence. Of course it does. Do you know why? He's had the advantage of seeing the physical evidence, the photographs. He's heard Christine testify. He's heard Allen Divine testify. He's read all the police reports. And he's had eleven months to think about this before--

Defendant sought a mistrial on the ground that this was an "improper comment on the Defendant's right to remain silent." The court overruled Defendant's request for mistrial and denied his additional requests that the state "be prohibited from any further argument on that" and the jury "be instructed to disregard" the argument.

Defendant's first point maintains the trial court erred and abused its discretion in making these rulings. Defendant argues "the prosecutor improperly commented on [Defendant's] exercise of his privilege against self-incrimination because [Defendant] was not obligated to make any statement before trial, but the State's argument led the jury to see [Defendant] as less credible *because he did not explain his defense earlier.*" (Emphasis added.)

A defendant's post-arrest *post-Miranda* silence cannot be used as evidence to incriminate the defendant. *State v. Dexter,* 954 S.W.2d 332, 338 (Mo. banc 1997); *State v. Graves,* 27 S.W.3d 806, 811-812 (Mo. App. 2000). An accused's right to be free from compulsory self-incrimination includes not only the prerogative to remain silent but also that such silence shall not be used to prove guilt, *see Graves,* 27 S.W.3d at 811-812, or to impeach his or her testimony. *State v. Sullivan,* 935 S.W.2d 747, 758-59[38] (Mo. App. 1996). "Standing alone, a prosecutor's references during closing argument to a defendant's post-arrest silence can merit reversal." *State v. Flynn,* 875 S.W.2d 931, 934[5].

In reviewing a claim of an improper reference to an accused's post-arrest silence, an appellate court must consider the comment in the context of the entire argument. *State v. Lopez,* 836 S.W.2d 28, 34 (Mo. App. 1992). When viewing the comments in context, it is clear Defendant has mischaracterized their nature. Here the questioned remarks came after the prosecutor reminded the jury it had "heard two stories[,]" one by both Hembree and Divine and another by Defendant. After rhetorically asking the jury who they were going to believe, the prosecutor explained it could consider Defendant's three felony convictions (manslaughter, possession of a firearm by a felon, and sexual assault of a child) in resolving credibility issues. He recounted for the jury the number of times Divine and Hembree had given their version of the events of May 24, 1999, and then summarized their at-trial testimony. Just before the complained of remarks, the prosecutor told the jury: "Their basic stories have always been the same, because they're the truth."

This jury had to make a credibility determination. The prosecutor was not prohibited from commenting on Defendant's credibility. *See State v. Futo,* 990 S.W.2d 7, 15 (Mo. App. 1999); *State v. Burrell,* 944 S.W.2d 948, 952[11]

(Mo. App. 1997). If an accused testifies, his or her testimony is subject to argument on credibility. *State v. Jacobs,* 939 S.W.2d 7, 11[12] (Mo. App. 1997). In such instances, a prosecutor can comment on the defendant's credibility as a witness and assert the improbability and untruthfulness of his or her testimony. *State v. Norville,* 23 S.W.3d 673, 685 (Mo. App. 2000).

The initial inquiry when analyzing if a prosecutor has impermissibly commented on an accused's post-arrest silence is whether the jury's attention was called to the fact that the accused was silent. *See State v. Martin,* 624 S.W.2d 879, 884 (Mo. App. 1981). When the remarks at issue here are viewed in the context of the entire argument, clearly the prosecutor was emphasizing the flaws and discrepancies in Defendant's version of the events of that night and the lack of credibility in his account. Nothing in the prosecutor's argument can, be interpreted as telling the jury it should find Defendant less credible because Defendant never spoke up earlier. To the contrary, the prosecutor's comments attacked Defendant's credibility based on the time and opportunity Defendant had to tailor his testimony to the physical evidence. The statement came without a direct or even reasonably inferable suggestion on whether Defendant had remained silent or made statements. We find nothing in the prosecutor's remarks which can be construed as a reference, either direct or veiled, to post-arrest silence by Defendant or the exercise of his fifth amendment privilege against self-incrimination. *See Lopez,* 836 S.W.2d at 34-35. The trial court did not commit reversible error when it overruled Defendant's objection to this argument. Point I is denied.

POINT II: ALLEGED ERROR IN ALLOWING VICTIM'S TESTIMONY ABOUT INJURY

Originally, the state charged Defendant with two counts of class A felony first-degree assault (knowingly inflicting serious physical injury) and two counts of armed criminal action. On the trial date, the state amended the assault counts to class B offenses, attempting to cause serious physical injury to Hembree and Divine.

At trial, the prosecutor asked Hembree: "Do you ... have any residual problems with your leg caused from this shooting?" Hembree answered positively and when the prosecutor asked what the problems were, Defendant objected on relevancy grounds. After the court overruled the objection, Hembree testified that her leg swells and "sometimes, it'll just kind of pop and ooze out some stuff." In his second point on appeal, Defendant asserts the trial court erred and abused its discretion when it allowed this evidence that the leg "popped" and "oozed" because it was irrelevant since the State had removed the element of serious physical injury from the case by reducing the assault counts from class A to class B felonies. Continuing, Defendant insists the evidence was presented "only to inflame the passions of the jury and cause them to convict [Defendant] out of sympathy for [victim] Hembree."

For evidence to be logically relevant, it should logically prove a fact in issue or corroborate other relevant evidence that bears on a principal issue. *Hutchison,* 957 S.W.2d at 763[9]; *State v. Finster,* 985 S.W.2d 881, 891 (Mo. App. 1999). To be legally relevant, the probative value of the evidence should outweigh its prejudicial effect. *State v. Barriner,* 34 S.W.3d 139, 144-45 (Mo. banc 2000). In an analysis of the legal relevance of evidence, the required balancing of prejudicial effect and probative value lies within the sound discretion of the trial court, *State v. Mallett,* 732 S.W.2d 527, 534[5] (Mo. banc 1987), and an appellate court

will only interfere when an abuse of a trial court's broad discretion is shown. *Hutchison,* 957 S.W.2d at 763[8].

The crime of class B felony first-degree assault of which Defendant was convicted, is described in §565.050, as follows:

> 1. A person commits the crime of assault in the first degree if he attempts to kill or knowingly causes or attempts to cause serious physical injury to another person.
>
> 2. Assault in the first degree is a class B felony unless in the course thereof the actor inflicts serious physical injury on the victim in which case it is a class A felony.

In developing his argument, Defendant recognizes that "the extent of a victim's injuries (or even whether the victim is injured at all) is not a necessary element of Class B felony first degree assault when a defendant is charged with knowingly attempting to cause serious physical injury to another person." *State v. Lauer,* 955 S.W.2d 23, 25 (Mo. App. 1997). Moreover, Defendant recognizes that proof that a victim was wounded "is strong evidence of an attempt to kill or do great bodily harm." *State v. McMahan,* 821 S.W.2d 110, 112 (Mo. App. 1991). Defendant argues for reversal, however, by claiming the testimony about the residual effect of the wound, i.e., leg "oozing" and "sometimes" popping, did not have any "tendency to directly establish [Defendant's] guilt" on this charge. Continuing, he asserts that "showing the lasting effects of this wound did not advance the State's case by even the slightest amount as to whether or not this was a case of self-defense, the only real issue in the case." With this as his premise, Defendant suggests the ""logical' relevance of the lasting nature of the wound was minimal if not nonexistent." He concludes by saying that even if the testimony "had some minimal logical

relevance, its prejudicial impact greatly outweighed that insignificant amount." We disagree.

Evidence that Hembree was wounded logically tended to prove a relevant fact in issue, i.e., whether Defendant attempted to kill or do great bodily harm to Hembree. As stated in *McMahan,* proof that Hembree was wounded was "strong" evidence of Defendant's attempt to kill or do great bodily harm. 821 S.W.2d at 112. However, the presence of "strong" evidence in the record did not preclude further corroborating evidence on that issue. The "residual effect" evidence tended to corroborate other evidence presented of Defendant's attempt to kill or do great bodily harm to Hembree. *See Hutchison,* 957 S.W.2d at 763[8]. Among other things, it tended to show the wound was not an insignificant flesh wound or mere scratch. The "residual effect" evidence was logically relevant and the court did not err in its implicit ruling to that effect. Moreover, we find its probative value outweighed its prejudicial effect. No additional evidence about residual effects was presented, and the State never alluded to the permanent injury evidence during closing argument. Considering the plethora of evidence about Defendant's conduct toward Hembree, the sparse mention of residual effects from the wound could not have been a source of jury sympathy for Hembree to the point of depriving Defendant of a fair trial. Point II is denied.

POINT III: CLOSING ARGUMENT ABOUT FUTURE CRIME POTENTIAL

Defendant's third point complains the trial court committed reversible error in its rulings when Defendant objected to this closing argument by the prosecutor: "Phillip Rath is obsessive and dangerous. He's a dangerous person. They deserve peace." Defendant objected that this was a request for "specific deterrence," moved for a mistrial, and

asked the court to restrain the prosecutor from that line of argument. The court denied Defendant's requests. The prosecutor then concluded her remarks without returning to such argument.

Defendant insists the prosecutor's argument was an impermissible and improper suggestion that the jury should convict Defendant to remove a dangerous person from the lives of victims Hembree and Divine. He urges reversal on the theory that the prosecutor's remarks had a "decisive effect on the jury because it solicited the jury to convict [Defendant], not for what he might have done, but so [the victims] could have peace;' so that he could not endanger them in the future."

For a prosecutor to speculate about future crimes or possible future conduct of an accused is impermissible. *State v. Tiedt,* 357 Mo. 115, 206 S.W.2d 524, 527-28 (Mo. banc 1947); *State v. Hurst,* 845 S.W.2d 669, 671[3] (Mo. App. 1993). However, reversal is not required in every instance in which a prosecutor steps beyond the boundary of proper argument. *State v. Gilmore,* 681 S.W.2d 934, 944[31] (Mo. banc 1984).

In *State v. Long,* 768 S.W.2d 664 (Mo. App. 1989), the prosecutor made a closing argument in which he suggested the jury not put "them back on the street to do it again." *Id.* at 665. The defendant's objection to the argument was overruled. In refusing to reverse Long's conviction, the eastern district explained:

> It is axiomatic that an accused is entitled to a fair trial and that it is the duty of the prosecutor to see that he gets one. When argument goes beyond bounds so as to excite and inflame passion or prejudice, the argument is error. It is however, equally well settled that the trial court has wide discretion

> in ruling on closing argument and in determining whether a comment is prejudicial.
>
> A conviction will be reversed for improper argument only if it is established that the argument or the comments had a decisive effect on the jury verdict or that the trial court abused its discretion.
>
> The trial court did not abuse its discretion in overruling objections to the prosecutor in the total context of arguments made by defense counsel and comments by the prosecutor. The prosecutor's argument principally referred to [separate issues of identification].

Id. at 666[2,3] (citations omitted).

In *Hurst,* the prosecutor told the jury: "What I would ask you is that you not return a verdict of not guilty, and allow [Defendant], a dangerous person, to commit crimes such as this again." 845 S.W.2d at 671. A timely objection to the comment was overruled. In affirming on appeal, the eastern district reasoned:

> The. . . remark was not spoken in such terms as would spark personal fear in the jurors. Further, the prosecutor's argument focused principally on Victim's identification of Defendant and the corroborating details about the car and gun. Considering these factors, we find [the] prosecutor's brief remarks could not have elicited such prejudice so as to have had a decisive effect on the case and the trial court did not abuse its discretion.

Id. (citation omitted). The *Hurst* court continued by noting that the evidence against the accused was overwhelming. After summarizing the evidence, it concluded: "Given the overwhelming evidence, we find no prejudice warranting reversal." 845 S.W.2d at 671[4].

Here, as in *Hurst,* the prosecutor's argument was not spoken in terms that would spark personal fear in jury members. Moreover, the prosecutor's argument focused principally on credibility issues, details corroborating the victims' testimony, and the jury instructions. Once Defendant objected to the "deserve peace" argument, the prosecutor told the judge at the bench she would say nothing further like this, and she did as promised.

Although Defendant suggests the evidence against him was not "overwhelming" in the sense described in *Hurst,* we disagree. Our account of the facts earlier in the opinion demonstrates otherwise. From the facts in this record, we conclude that the prosecutor's brief comments that "he's a dangerous man" and "they deserve peace" could not have aroused such prejudice as to have had a decisive effect on the case. *See Hurst,* 845 S.W.2d at 671. *See also State v. Jones,* 227 S.W.2d 713, 719[18] (Mo. 1950) (holding prosecutor's remark that accused was a dangerous man, not reversible error under the facts shown). Point III is denied.

POINT IV: ERROR IN JUDGMENT AND SENTENCE IN RE FELONY CLASS

As an alternative claim of trial court error, Defendant points out the trial court mistakenly recorded in the judgment and sentence that Defendant was convicted of two counts of class A felony first-degree assault. Defendant requests remand so that the judgment can be corrected to show his assault convictions as class B felony first-degree assaults. The State concedes the judgment is wrong. The State further

points out that the judgment does not include the trial court's finding that Defendant was a prior and persistent offender, §558.016.

Finding merit in the Defendant's fourth claim of trial court error, but no merit in other points on appeal, we remand with directions that the trial court correct the judgment to show (a) Defendant was adjudged guilty of two counts of the class B felony first-degree assault, and (b) Defendant was found to be a prior and persistent offender per §558.016.

Kenneth W. Shrum, Judge

PARRISH, P.J. - CONCURS
MONTGOMERY, J. - CONCURS

MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT
300 Hammons Parkway
SPRINGFIELD, MISSOURI 65806-2518

SANDRA L. SKINNER
CLERK

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May 22, 2001

Mr. Kent Denzel
Public Defender
3402 Buttonwood
Columbia, MO 65201

RE: State of Missouri, Respondent
vs. Phillip Rath, Appellant
Case No. 23706-1

Dear Mr. Denzel:

Today's date the Court has issued the following order in the above cause:

"Now on this day, the Court, having fully considered appellant's motion for rehearing or to transfer this cause to the Supreme Court of Missouri, does overrule said motion for rehearing and does deny said application for transfer."

Sincerely yours,

/s/

SANDRA L. SKINNER, Clerk

IN THE SUPREME COURT OF MISSOURI

SC83681
SD23706

May Session, 2001

State of Missouri,
Respondent

vs. (TRANSFER)

Phillip Rath,
Appellant

Now this day, on consideration of the appellant's application to transfer the above-entitled case from the Missouri Court of Appeals, Southern District, it is order that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, Thomas F. Simon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session, 2001, and on the 26th day of June, 2001, in the above-entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 26th day of June, 2001.

/S/

Clerk

EXTRACT FROM FINAL ARGUMENT OF PROSECUTOR
(Supp. Tr., pp. 9-10)

And then we have the story of Phillip Rath. Phillip Rath claims his story matches the physical evidence. Of course it does. Do you want to know why? He's had the advantage of seeing the physical evidence, the photographs. He's heard Christine testify. He's heard Allen Divine testify. He's read all the police reports. And he's had eleven months to think about this before—

MR. ZUZUL[1]: Objection. Can we approach the bench?

(At this time counsel approached the bench and the following proceedings were had:)

MR. ZUZUL: Judge, I move for a mistrial at this time. I think the State is making improper comments on the Defendant's right to remain silent. He does not have to give any statements directly afterwards to somehow portray [indiscernible][2] complaining witness. The fact they testifying [indiscernible] the depositions, that the Defendant sat back and waited for eleven months I think is an improper comment on his right to remain silent.

I would alternatively move that the Prosecutor, your Honor, be prohibited from any further argument on that, and that the jury be instructed to disregard that argument.

---

[1] Defense counsel.

[2] The "indiscernible" notations are included in the trial record in brackets.

MS. STEMMONS[3]: Judge, I don't think it's improper. He took the stand yesterday. I didn't say that he didn't give a statement. I just said he had—

THE COURT: I think the objection [indiscernible]. Go ahead.

(Proceedings returned to open court.)

MS. STEMMONS: Gentlemen, it's been eleven months since this incident. His story conveniently matches the physical evidence.

You watched him testify yesterday. He had specific times, specific dates. He knew Easter. He knew exactly where he had been, what he had said. He knew. He knew the story to tell.

---

[3] Prosecutor.